

GARY M. RESTAINO  
United States Attorney  
District of Arizona

KEVIN M. RAPP  
Arizona State Bar No. 014249  
Email: kevin.rapp@usdoj.gov  
COLEEN SCHÖCH  
Georgia State Bar No. 366545  
Email: Coleen.Schoch@usdoj.gov  
Assistant U.S. Attorneys  
Two Renaissance Square  
40 N. Central Ave., Suite 1800  
Phoenix, Arizona 85004  
Telephone: 602-514-7500  
*Attorneys for Plaintiff*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,  
  
Plaintiff,  
  
vs.  
  
David Allen Harbour,  
  
Defendant.

No. CR-19-00898-001-PHX-DLR  
  
**UNITED STATES' REPLY TO  
DEFENDANT'S RESPONSE TO  
GOVERNMENT'S MOTION  
TO STRIKE (DOC. 727)**

**SUMMARY**

Defendant's motion to extend the page limit 51 pages beyond the 17 page limit for objections to the PSR should be denied for two independent reasons. First, defendant has failed to demonstrate "good cause" as to why he should have 68-pages to respond to the PSR in light of a long standing local rule that limits all pleadings to 17 pages. Second, the majority of his objections are merely scattershot challenges to the jury verdict based on unsupported theories that were implicitly rejected by the jury. The jury unanimously found the defendant guilty of 17- counts of the 23 charged in the second superseding indictment (SSI) beyond a reasonable doubt. Then, Defendant, having no real choice because of the overwhelming evidence, pleaded guilty to count 24 (tax evasion). The evidence in support of count 24 is basically the same for counts 25 and 26. As for counts 27-34, Magistrate

1 Judge Deborah Fine, after several days of evidentiary hearings, found that Defendant had  
 2 committed the offenses alleged in a supplemental petition to revoke release and held him  
 3 in custody pending trial.

4 In sum, a sentencing hearing and/or written objections is not an opportunity to retry  
 5 the case or revisit factual findings by the Court and the Magistrate Judge. Defendant's  
 6 pleading should be stricken and he should be directed to file objections that focus on the  
 7 guideline enhancements where there is any reasonable factual dispute that does not  
 8 contradict the jury verdict or the Court's various factual findings rather than factual  
 9 grievances that have already been litigated (some several times) and rejected by a jury, this  
 10 Court, a magistrate judge, and his own under oath admissions.

### 11 LAW AND ARGUMENT

12 At least three authorities combine to safeguard the accuracy of fact-findings at a  
 13 federal sentencing. Most fundamentally, the due process clause demands that evidence  
 14 used at sentencing be reasonably reliable. *See United States v. Tucker*, 404 U.S. 443, 447  
 15 (1972). The Federal Guidelines likewise require that information used at sentencing exhibit  
 16 "sufficient indicia of reliability to support its probable accuracy." USSG §6A1.3(a). And  
 17 Federal Rule of Criminal Procedure 32 offers a collection of procedural guarantees that  
 18 together "provide for the focused, adversarial development" of the factual and legal record.  
 19 These include: a PSR that calculates the defendant's Guideline range, identifies potential  
 20 bases for departure from the Guidelines, describes the defendant's criminal record, and  
 21 assesses victim impact, (Fed. R. Crim. P. 32(d)); the timely disclosure of the PSR, (Fed. R.  
 22 Crim. P. 32(e)); an opportunity to object to the PSR, (Fed. R. Crim. P. 32(f)); an  
 23 opportunity to comment on the PSR orally at sentencing, (Fed. R. Crim. P. 32(i)(1)), and a  
 24 ruling on "any disputed portion of the PSR or other controverted matter" that will affect  
 25 the sentence, (Fed. Crim. P. 32(i)(3)). *United States v. Ameline*, 409 F.3d 1073, 1085-86  
 26 (9th Cir. 2005) (en banc) ("However, when a defendant raises objections to the PSR, the  
 27 district court is obligated to resolve the factual dispute, and the government bears the  
 28

1 burden of proof . . . . The court may not simply rely on the factual statements in the PSR.  
2 “);701 Fed. Appx. 592, 595 (9th Cir. 2017)(unpublished)(“A district court may not simply  
3 rely on the factual statements in a PSR when a defendant objects to those facts.”). And as  
4 in the Eighth Circuit, the principle is not merely abstract, but has instead given rise to  
5 reversals when the government failed to offer evidence in favor of the PSR. *See United*  
6 *States v. Showalter*, 569 F.3d 1150, 1158-1160 (9th Cir. 2006); Khan, 701 Fed. Appx. at  
7 595.

8 Here, the facts in the PSR, as argued by Defendant, are not merely the Government’s  
9 version of the facts where no evidence has been offered in support other than investigative  
10 reports authored by investigating agents. As the Court knows, there has been substantial  
11 pre-trial litigation involving many of the same issues that defendant now re-urges in his  
12 oversize brief. For example, Defendant relentlessly urges his Operation Choke Point theory  
13 based on the irrelevant testimony of Dr. Manning. That theory was implicitly rejected by  
14 the jury. In addition, defendant’s objections raises many of the same issues in his Rule 29  
15 motion that was found similarly unpersuasive by this Court based on the testimony and  
16 evidence presented at trial.

17 Importantly, the jury has spoken. In sum, the PSR is based on reports (corroborated  
18 by trial testimony) and evidence presented at trial (or admitted to in the case of count 24).  
19 The factual underpinnings of Counts 25 and 26 are substantially related to Count 24,  
20 therefore, sufficient evidence has been presented to support those counts as relevant  
21 conduct. Similarly, counts 27-34 are relevant conduct as the facts related to those counts  
22 were the subject of a lengthy evidentiary hearings in support of a supplemental petition to  
23 revoke defendant’s release. The Magistrate Judge found that defendant had indeed violated  
24 those conditions by committing federal crimes.

25 In sum, Defendant’s objections should be refiled within the 17- page limit set by the  
26 local rule. Defendant provides no authority in support of his newly minted theory that the  
27 local rules don’t apply to objections. In any event, this Court should direct defendant to file  
28 objections that address offense characteristics where he is able to articulate a reasonable

1 factual dispute that has not already been resolved by this court, the jury, a Magistrate Judge,  
2 or defendant's own under oath admission.

3 Respectfully submitted this 30th day of May, 2023.

4 GARY M. RESTAINO  
5 United States Attorney  
6 District of Arizona

7 s/Kevin Rapp  
8 KEVIN M. RAPP  
9 COLEEN P. SCHOCH  
10 Assistant U.S. Attorneys

11 **CERTIFICATE OF SERVICE**

12 I hereby certify that on this same date, I electronically transmitted the attached  
13 document to the Clerk's Office using the CM/ECF System for filing a copy to the following  
14 CM/ECF registrants:

15 Stephen M. Dichter  
16 Justin R. Vanderveer  
17 *Attorneys for Defendant*

18 s/D. Parke  
19 U.S. Attorney's Office  
20  
21  
22  
23  
24  
25  
26  
27  
28